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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

JARRETT ELI SWEARENGIN,

Defendant and Appellant.

C062270

(Super. Ct. No. CRF080812)

A jury convicted defendant Jarrett Eli Swearengin of felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1); undersigned section references are to the Penal Code; count 1), felon carrying a loaded firearm in a public place or vehicle (§ 12031, subd. (a), (1), (2)(A); count 2), and possession of ammunition by a person prohibited from possessing a firearm (§ 12316, subd. (b)(1); count 3). The jury did not find a gang enhancement (§ 186.22, subd. (b)(1)) alleged in connection with each count to be true. In bifurcated proceedings, the court found a strike prior (§ 667, subds. (b)-(i)) and a prior prison term allegation (§ 667.5, subd. (b)) to be true.

Sentenced to state prison for an aggregate term of seven years, defendant appeals. He contends the trial court had a duty to bifurcate the gang enhancement or limit the gang-related evidence. He asserts the error was prejudicial in that he was unable to present his defense. Defendant also contends that the trial court abused its discretion in allowing evidence of his 2001 felony conviction with a gang enhancement. He claims the error was prejudicial, denying his right to due process. We will affirm the judgment.

FACTS

On February 9, 2008, defendant's former girlfriend, Charise Vidales, called defendant's parole agent, Joe Modesto, and reported that she and defendant had argued and that defendant had just threatened to kill her new boyfriend. According to Agent Modesto, defendant was listed in the records of the California Department of Corrections as an associate of the Norteño criminal street gang and had a "Broderick Boy" tattoo on his lower back. Vidales claimed that defendant showed her a firearm which he carried under a black cup holder in the center console of his car. Agent Modesto immediately called West Sacramento Police Officer Brian Schmidt, relayed the information, and provided a description of defendant's car and his direction of travel. Agent Modesto wanted defendant detained as a parole violator and the firearm obtained. Officer Schmidt immediately spotted defendant in the car traveling northbound on Jefferson Boulevard. No one else was in the car.

Officer Schmidt had to wait for his partner and called Agent Modesto.

Five minutes after receiving Vidales's call, Agent Modesto had Vidales make a call to defendant in Agent Modesto's presence. Agent Modesto overheard Vidales ask for defendant's location. Defendant stated that he was at a barbershop and made additional death threats to the new boyfriend.

Officer Schmidt and Officer Anthony Herrera went to the barbershop and detained defendant. Defendant denied that he had anything illegal on him. When asked if he had anything illegal in his car, he denied having a car. Officer Schmidt found car keys in defendant's pocket. The keys opened the car that Officer Schmidt had seen defendant driving. A search revealed a loaded .380 caliber handgun inside the center console. There were six unexpended bullets inside the magazine in the gun. A photo album in the trunk had photos of gang members throwing gang signs. During the drive to the police station, defendant stated, "'I'm probably going to get five years for this'" and "'You're lucky you found me because I was going to go to Oak Park and hide out.'"

Sergeant Jason Winger, a gang expert, recounted the history of the Nuestra Familia prison gang, the Norteño original street gang, and a Norteño subset, the Broderick Boys, a former local street gang in West Sacramento, as well as the importance of symbols, colors, hand signs, tattoos, and so on. Winger explained that there are over 100 "validated" Norteño Broderick

Boy gang members and about 70 Norteño Broderick Boy "affiliates" whose primary activities were narcotics trafficking, assaults, robberies, weapons violations, auto thefts, and witness intimidation. Based on his contacts with defendant and his family as well as law enforcement contacts with defendant, Winger opined that defendant was a member of the Norteños and Broderick Boys. Winger noted the following incidents which established defendant's gang membership: in 1999, defendant possessed two handguns and gang paraphernalia in his residence; defendant's guilty plea in 2001 to "crimes" with a "criminal street gang charge" as a result of an "altercation"; defendant's presence in a car with another Broderick Boy gang member in March 2007; defendant's "Broderick" Boys tattoo; and defendant's photo with other documented gang members on the internet. Winger opined that defendant's current offenses were gang related in that possession of a firearm would allow a gang member to retaliate for the gang, defend the gang, and intimidate others on behalf of the gang.

The parties stipulated that defendant had previously been convicted of an unspecified felony.

Defendant did not testify and the defense called no witnesses.

DISCUSSION

Defendant contends the trial court's refusal to limit the gang enhancement evidence violated his due process right to a fair trial. He claims the trial court had a duty to bifurcate

the gang enhancement or limit the gang related evidence. He asserts the error was prejudicial in that he was unable to present his defense. In his reply brief, he concedes that he never requested bifurcation. He also concedes that the trial court had no duty to bifurcate sua sponte.

Defendant also contends that the trial court abused its discretion in allowing evidence of defendant's 2001 felony conviction with a gang enhancement. He claims the error was prejudicial, denying his right to due process, in that the gang evidence "evoked an emotional bias against [him]," rendering his trial fundamentally unfair. We find no error and, assuming error occurred, it was harmless beyond a reasonable doubt.

Background

Defendant filed a motion in limine, seeking to prohibit gang expert testimony on the ultimate issue that the offenses were committed for the benefit of the gang. Defendant also sought to preclude gang expert testimony based on hearsay such as police reports.

At the hearing on defendant's in limine motion, defendant added that he wanted the gang expert barred from recounting the history of gangs, arguing such evidence was irrelevant and prejudicial. Defendant also argued that his 2001 admission of a gang enhancement was irrelevant, impermissible propensity evidence, and unduly prejudicial. Defendant's prior conviction for criminal threats (§ 422) and admission of the gang

enhancement (§ 186.22) involved defendant's threat to the family of a woman whose daughter defendant had assaulted.

The prosecutor claimed that the evidence of the prior was relevant to show defendant's motive and knowing possession of a firearm after being convicted of a felony, citing Evidence Code section 1101, subdivision (b). The prosecutor argued that the prior gang enhancement showed defendant's knowledge of members engaging in a pattern of criminal activity. The prosecutor claimed that defendant's criminal history was relevant to the gang expert's opinion whether defendant possessed the firearm to benefit the gang. The prosecutor claimed the evidence was more probative than prejudicial. The prosecutor conceded that the expert could not testify on the ultimate fact (specific intent) but could express an opinion on a hypothetical set of facts, citing *People v. Valdez* (1997) 58 Cal.App.4th 494 (*Valdez*) and *People v. Garcia* (2007) 153 Cal.App.4th 1499.

Citing Evidence Code sections 352 and 1101, the trial court ruled that defendant's prior conviction with the attached gang enhancement was admissible, concluding that the probative value outweighed the possible prejudice and commenting "it would be too difficult to parse these issues" and "create a lot of confusion if we tried." The court noted that it would not allow "extended journeys into this area, but to the extent that the prior felony conviction is an element of the three charged counts, and the prior gang admission is an element to the gang enhancement, it will be admitted." To assist the jury, the

court determined the gang expert could testify about gangs and express his opinion on whether defendant's actions benefitted the gang, addressing hypotheticals but not defendant's specific intent.

At trial, Sergeant Winger testified about gangs and expressed his opinions as previously recounted and referred to a 2001 "altercation" for which defendant "pled guilty to crimes to include a criminal street gang charge" and to defendant's 1999 possession of weapons. Defendant moved for dismissal of the current gang enhancement (§ 1118.1), arguing that there was insufficient evidence. The court denied the motion.

No evidence was introduced that defendant's prior conviction was for criminal threats (§ 422). The jury was instructed that the parties stipulated that defendant had been convicted of a felony, but nothing more was specified.

Analysis

Initially, we note, and defendant concedes, he never specifically sought bifurcation of the gang enhancement. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051; *People v. Calderon* (1994) 9 Cal.4th 69, 79.) Any assertion of error as to this issue has been forfeited. (*People v. Pinholster* (1992) 1 Cal.4th 865, 935.)

"In general, where a gang enhancement is alleged, expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would

assist the trier of fact.' [Citations.]" (*Valdez, supra*, 58 Cal.App.4th at p. 506.) "'As a general rule, a trial court has wide discretion to admit or exclude expert testimony.

[Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused.

[Citation.]" [Citation.]" (*Ibid.*)

We find no abuse of discretion here. The trial court allowed Sergeant Winger to testify that the Broderick Boys are a subset of the Norteños and that defendant was a member of the same. The evidence about the Norteños/Broderick Boys and defendant's membership in such gang is a matter beyond the common knowledge of jurors. The trial court did not abuse its discretion in allowing the gang expert to so testify. (*Valdez, supra*, 58 Cal.App.4th at p. 506-507.)

Sergeant Winger testified based on a hypothetical set of facts as to whether a gang member's possession of a firearm would benefit the gang. He opined that a gang member's possession of a firearm would benefit the gang to the extent it could be used to commit crimes, defend the gang, and intimidate others. Such an opinion was not impermissible and did not exceed the hypothetical to cover defendant's specific intent. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947; *People v. Ward* (2005) 36 Cal.4th 186, 209-210; *People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

The jury was never told defendant's prior conviction was for violation of section 422, criminal threats; instead,

Sergeant Winger testified that as a result of an altercation, defendant pled to crimes along with a gang enhancement. Defendant's prior admission of a gang enhancement was relevant to establish knowledge, motive and the specific intent element of the current gang enhancement. (§ 186.22, subd. (b)(1); *People v. Lewis* (2001) 26 Cal.4th 334, 370; *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.)

In any event, if any error occurred, it was harmless. There was no miscarriage of justice. (*People v. Earp* (1999) 20 Cal.4th 826, 878; cf. *People v. Avitia* (2005) 127 Cal.App.4th 185, 194.) The expert testimony was tied to the gang enhancement alleged in connection with each of the three charged offenses, and the jury did not find the gang enhancements to be true. The evidence of defendant's guilt on the three charged offenses was overwhelming. Defendant's former girlfriend contacted defendant's parole agent and reported that defendant had threatened her new boyfriend. She knew that defendant carried a firearm inside the center console. The parole agent immediately notified other law enforcement to be on the lookout for defendant. An officer spotted defendant driving the described car. Meanwhile, the parole agent personally overheard defendant's threats over his former girlfriend's phone. The parole agent learned of defendant's whereabouts through this phone call between defendant and the former girlfriend. The

parole agent alerted law enforcement who detained defendant. Defendant denied having a car. Car keys found on his person belonged to the car the officer had seen defendant driving shortly before the detention. The loaded gun was then found inside the center console. In bifurcated proceedings, the court found a strike prior and a prior prison term allegation to be true. Defendant was a convicted felon. The evidence overwhelmingly supported the charges, that is, convicted felon in possession of a firearm, convicted felon carrying a loaded firearm in a public place or vehicle, and possession of ammunition by a person prohibited from possessing a firearm.

Further, defendant has failed to demonstrate that the admission of the gang-related evidence violated his federal due process rights. His trial was not fundamentally unfair. The gang-related evidence was relevant to the issues of motive, knowledge and intent for the current alleged gang enhancement and was not unduly prejudicial. (Cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-232.) Here, the prosecutor's theory, as demonstrated by his question to Sergeant Winger, was that defendant's former girlfriend had disrespected him. Contrary to defendant's claim on appeal, sufficient evidence and permissible inferences therefrom showed that defendant possessed the weapon for the benefit of the gang. Sergeant Winger testified that a gang member's possession of a firearm could be used to intimidate others for the benefit of the gang. Any error in

admitting the gang evidence was harmless beyond a reasonable doubt; the verdict would have been the same.

DISPOSITION

The judgment is affirmed.

_____, J. SIMS

We concur:

_____, P. J. SCOTLAND

_____, J. ROBIE